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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

CORNING GLASS WORKS, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-16a) is reported at 480 F.2d 1254. The opinion and supplemental findings of the district court (App. C, *infra*, pp. 18a-39a) are reported at 341 F.Supp. 18.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1973 (App. B, *infra*, p. 17a). On Sep-

tember 17, 1973, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(d)(1), prohibit an employer from paying a higher base wage to male night shift inspectors performing the same work as female inspectors on the day shift, where the higher base wage (1) was adopted to induce men to perform work traditionally performed by women and (2) is paid in addition to a night shift bonus which is paid to all employees, regardless of sex, for night work.

STATUTES INVOLVED

Section 6(d)(1) of the Fair Labor Standards Act, 52 Stat. 1062, as amended, 77 Stat. 56, 29 U.S.C. 206(d)(1), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed un-

der similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Section 6(d)(3) of the Fair Labor Standards Act, as amended, 29 U.S.C. 206(d)(3), provides:

> For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

STATEMENT

This action was brought by the Secretary of Labor in the United States District Court for the Middle District of Pennsylvania to enjoin Corning Glass Works ("Corning") from paying lower wages to women inspectors employed at its plant in Wellsboro, Pennsylvania, than it paid to men performing the same work, excluding wage differences attributable to contractual shift differentials.[1] The Secretary

[1] The Department of Labor has never challenged the lawfulness of "shift differentials," or differences in wages based on time of day worked. Concededly it may be appropriate to

alleged that the wage differential discriminated against women inspectors on the basis of sex in violation of the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act (29 U.S.C. 206(d)(1)), and sought to restrain Corning from further violations of the Act and from withholding back pay due to women inspectors because of past violations.

Until October 16, 1966, except during World War II, only women worked as inspectors during the day shifts and only men did such work at night (J.A. 18-19).[2] When the practice of employing men inspectors at night was instituted, Corning did not pay shift differentials (J.A. 19) and the men in all other job classifications were paid the same base wages, regardless of shift (Supp. Fdgs. 15 and 16, App. C, *infra*, pp. 29a-30a). Nonetheless, Corning historically paid its men inspectors a higher base wage than it paid to women inspectors. When Corning adopted a plant-wide shift differential paid to all employees working at night, that differential was added to the higher base wage paid to men inspectors (J.A. 21).

Corning denied that its concededly unequal wage rates were subject to the equal pay provisions of the Fair Labor Standards Act: specifically, Corning denied that otherwise identical work performed at night

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pay night shift workers more than day shift workers. See 29 C.F.R. 800.145. Our contention is, instead, that the Equal Pay Act prohibits an employer from paying higher wages to men working night shift *solely because* they are men.

[2] "J.A." references are to the joint appendix in the court of appeals, a copy of which has been lodged with the Clerk.

and during the day was work "performed under similar working conditions" within the meaning of the Act.[3]

1. The practice of compensating men inspectors at higher base rates began in 1925, when Corning started automating its Wellsboro plant. Prior to 1925, the only inspectors employed at the Wellsboro plant were women who worked on both the day and afternoon shifts (J.A. 18-19). When automation brought around-the-clock production, Corning employed men as inspectors on the night shift because Pennsylvania law prohibited the employment of women after midnight. The men were paid higher base rates, not because they worked at night,[4] but because they were men and, as such, commanded higher rates (J.A. 19-20).

Corning did not pay shift differentials as such until it was organized by a union in 1944 and required to do

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[3] Corning also claimed that the inspector packers, positioner inspectors and frost light inspectors on the night shift were required to exert greater effort than were their counterparts on the day and afternoon shifts, and that the quality inspectors on the night shift, although exerting equal effort, were required to exercise greater responsibility than their counterparts on the day and afternoon shifts. It further claimed that even if the work performed in each of the four inspector classifications was found to be equal, the violations had been corrected by its October 1966 agreement with the union to open job vacancies in the inspector classifications to all employees regardless of sex. The courts below did not rule on these contentions, although the district court did enter supplemental findings of fact relating to them.

[4] The base rates established for all-male jobs were the same on all three shifts (Supp. Fdgs. 15 and 16, App. C, *infra*, pp. 29a-30a).

so by a collective bargaining agreement.[5] The first contract made no changes in Corning's existing base rate schedules (including those established for men and women inspectors), but it did require Corning to develop an equitable wage rate plan for all job classifications (J.A. 373-374). Pursuant to this provision, Corning adopted a job classification system developed by its consultants, Stevenson, Jordan and Harrison, the "SJ&H plan." The SJ&H plan described and evaluated the inspector jobs on the basis of "General schooling," "training period," "manual skill," "versatility," "job knowledge," "responsibility," and "working conditions" (Fdgs. 15 and 16, App. C, *infra*, pp. 20a-21a; J.A. 1157). The SJ&H plan defined "working conditions" as the "surrounding conditions (wet, heat, cold, dust, grease, noises, etc.) and physical hazards (bruises, cuts, heavy lifting, fumes, slippery floors, machine chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing the[ir] duties" (Exh. J to Pltf's Exh. 1, pp. 10, 28). The district court found that "[u]nder the SJ&H plan, the ratings of [each] factor differed for each inspector job but the ratings of surroundings and hazards [*i.e.*, working conditions] were the same for the day and night shifts for each

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[5] The 1944 union contract established shift differentials of 3 cents per hour for employees on the nonrotating afternoon shift and 5 cents per hour for those on the nonrotating night shift (J.A. 21, 22). These differentials, the validity of which is not challenged by petitioner, have since increased to 10 and 16 cents per hour (J.A. 22).

job" (Fdg. 17, App. C, *infra*, p. 21a, J.A. 1157; Stip. P-50, J.A. 67).

However, the SJ&H plan perpetuated the practice of paying lower wages to women, since it provided that the men's wage rates were to be established by multiplying the plant's rating factor for a job by the prevailing rate for unskilled male labor, whereas women's wages were calculated by multiplying this same factor by the lower prevailing rate for unskilled female labor (Supp. Fdg. 42, App. C, *infra*, p. 35a, Exh. J to Pltf's Exh. 1, p. 13).[6]

These differentials between men and women were maintained, not only in each succeeding union contract, but also when Corning re-evaluated the jobs under the Corning Glass Works (CGW) plan in 1964 (Stip. P-55 and D-41, J.A. 63-64). The CGW plan, like the SJ&H plan, defined "working conditions" as a job's physical surroundings and hazards (J.A. 844-845); it did not include the time of day worked (Stip. D-40, J.A. 63; also J.A. 381). Moreover, the CGW plan adopted the same job descriptions and evaluations of skill, effort, responsibility and the like for the inspection jobs on each shift (Stip. D-41, J.A. 63).

The greater burden of night work was compensated by a shift differential, and not by varying the job evaluation of "working conditions." This was stated

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[6] Under this formula, the maximum rates for inspection work by men were $1.05, $1.155 and $1.255 whereas the maximum rates for women were 91.5 and 97.5 cents and $1.035 (J.A. 1067, 1068).

by Corning's expert witness, Dr. Paul Lehoczky (J.A. 845):

> Q. How do[es Corning] compensate employees for working at different times of day?
>
> A. They compensate them by a shift differential * * *.

Dr. Lehoczky added that differences of time of day worked were considered a "wage condition," not a "working condition" (J.A. 847).

Effective January 18, 1965, Corning merged its separate male and female rate schedules. This merger, however, preserved the differential in base rates between men and women inspectors because women were placed into a lower labor grade on the revised rate schedule with a lower rate of pay (Supp. Fdgs. 43 and 44, App. C, *infra*, pp. 35a-36a).

On October 16, 1966, Corning merged its separate seniority lists for males and females, and, since that time, women have been permitted to exercise their seniority to obtain jobs on the night shift (Supp. Fdg. 40, Fdg. 10, App. C, *infra*, pp. 35a and 20a). However, women inspectors were not allowed to displace less senior men inspectors employed on the night shift. Instead, women had to fill out transfer requests, wait for vacancies to occur, and then remain on that shift for a period of months to acquire sufficient tenure to avoid dismissal in the event of a reduction in force (Supp. Fdg. 47, App. C, *infra*, p. 36a). Despite these obstacles, some of the women inspectors transferred to the night shift; however, those who remained on the morning and afternoon shift continued

to receive the lower rates. Also, "a few male inspectors" took jobs on day and afternoon jobs, but "with [a] concomitant reduced base hourly rate" (Supp. Fdg. 58, App. C, *infra*, p. 38a).

The final change instituted by Corning occurred on January 20, 1969, when it abolished its separate base wage rates for day and night shift inspectors and established the same wage rate for all three shifts (J.A. 49-50). At the same time, however, through the device of retroactive wage increases, Corning raised the rates for its night shift inspectors to higher levels than those established under its new job evaluation plan and "red circled" these rates, thereby continuing the differentials that had previously existed between day and night inspectors (J.A. 47-51).[7]

2. The district court found that "except for the time of day worked, [the inspectors'] working conditions were the same," but concluded that "a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical" (App. C, *infra*, p. 24a; J.A. 1160). The court therefore dismissed the Secretary's action. The court of appeals affirmed, based on its reading of the Equal Pay Act's legislative history. The court below acknowledged that its construction of the Act is directly contrary to that of the Second

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[7] Under this arrangement, any employee with plant seniority as of or prior to January 20, 1969, who holds, or who subsequently takes, a job as inspector on the night shift receives the "red circle" rate (Supp. Fdg. 54, App. C, *infra*, p. 37a).

Circuit in the "remarkably similar" case of *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226, pending on petition for a writ of certiorari, No. 73-29 (App. A, *infra*, p. 9a).

REASONS FOR GRANTING THE WRIT

The opinion of the Third Circuit in this case rejects the central conclusion of the Second Circuit on the same issue between the same parties. The conflict could not be more direct. The conflict not only creates uncertainty for the parties (there is yet another equal pay case on the same issue pending against Corning in Rhode Island, Civ. No. 4036, D.R.I) and disparate treatment of similarly situated Corning employees in different states, but also creates uncertainty for the numerous industries which, like Corning, operate on a 24-hour basis and, until recently, have restricted their night shift to men. See, *e.g.*, *Shultz* v. *American Can Company*, 424 F.2d 356 (C.A. 8); *Hodgson* v. *Miller Brewing Company*, 457 F.2d 221 (C.A. 7); *Hodgson* v. *San Diego Unified School District*, 71 CCH Lab. Cas. ¶ 32,920 (S.D. Calif., 1973), pending on appeal, No. 72-2805 (C.A. 9). Review by this Court is therefore warranted.

1. The Secretary does not question Corning's right to pay higher wages to its employees who work undesirable night hours. The Secretary's Equal Pay Act regulations explicitly recognize the legitimacy of Judge Friendly's observation during the argument of the Second Circuit case that, "You'd have to pay me twice as much to work at night." See 29 C.F.R. 800.145. What the Secretary does challenge is Corning's right to maintain a wage differential which, although paid to certain employees working on the night shift, is unrelated to that fact, having its origin in sex, and is being paid *in addition* to the shift differential, which is paid to all employees, regardless of sex, working undesirable night hours.

Neither the Second nor the Third Circuit questioned the propriety of maintaining a wage differential based upon the time of day worked. The two courts differed, however, on whether "time of day worked" is a "working condition" or a "factor other than sex" justifying a wage difference. We believe that the Second Circuit's "persuasive explanation of how the bill took shape" (474 F. 2d at 232) demonstrates that the statutory term "working condition" was intended to encompass physical surroundings and hazards, not time of day worked (see point 2, *infra*, p. 13).

However, we believe the Act applies in the circumstances of this case under either reading of these statutory terms. Judge Friendly's opinion for the Second Circuit goes to the heart of the matter in stating (474 F. 2d at 233):

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women daytime inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed. * * *

A higher wage paid to men to do what they called "female work"—which the Act forbids—does not become lawful simply because the men work at night. Of course workers may be paid more for night work—and, since 1944, Corning has maintained a shift differential to do just that. But the wage differential the Secretary challenges has nothing to do with the fact that the work is at night: it began as an increment to men to do "female work" and was simply added on to shift differentials when they were instituted in 1944. It has been carried forward in each collective bargaining agreement and exists today as the "red circle" rates for night shift workers employed before January 20, 1969.

The district court found that "except for the time of day worked, [the inspectors'] working conditions were the same" (Pet. App. C, *infra*, p. 24a). But time of day worked is compensated for by shift differentials which are not challenged by the Secretary. Thus, regardless of whether "time of day worked" is a "working condition" or a "factor other than sex," the wage differential challenged here is not the one based on time of day worked (*i.e.*, the shift differential), but another separate and additional differential having its origins in considerations of sex.

This is not to suggest that varying wage rates for different working conditions may be challenged whenever they embody subtle judgments based on considerations of sex. But we do contend that where jobs differ only in respect to a discrete condition or factor, such as time of day, which is separately and independently compensated by a differential geared to that condition and where the base rate of pay therefore reflects no difference in working conditions (however defined), the jobs are equal for purposes of the Equal Pay Act.

2. In any event, we believe the Second Circuit's conclusion, that time of day worked is a proper subject for "a differential based on any other factor other than sex," rather than a "working condition," more accurately reflects industry practice and the legislative history of the Equal Pay Act. As originally introduced, the Act's equal pay requirement would have applied to "equal work on jobs the performance of which requires equal skills" (H.R. 3861, 88th Cong., 1st Sess.). During the hearings, however, industry representatives, including Ezra G. Hester from Corning Glass Works, argued that this definition was too broad, and urged that the bill's equal work standard be restated in terms of "[t]he four factors embrac[ing] those aspects of job worth that are always considered * * * as being important * * * [for job evaluation purposes]: Effort, skill, responsibility and working conditions." "Working conditions," Mr. Hester informed the Labor Subcommittees, comprised two "subfactors": "surroundings"

and "hazards." Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. 233-234, 236, 238; Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 882 and S. 910, 88th Cong., 1st Sess. 96-104.

In response to this and similar testimony, the bill was rewritten to incorporate the industrial practice of using "job classification systems" (109 Cong. Rec. 9210). This, as the Second Circuit recognized, is persuasive evidence that the drafters of the legislation intended that the "similar working conditions" language should have the same meaning as in industrial practice—as exemplified by Corning's own job evaluation plan (*supra*, p. 7; see 474 F. 2d at 232).[8]

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[8] The remainder of the legislative history, specifically the House Committee Report and Representative Goodell's comments, are set out in both opinions below. While we believe the better interpretation of the Committee Report is that it lists "differences based on time of day worked" under the bill's "broad general exclusion" permitting "differentials based on any other factor other than sex," we concede there is some ambiguity. The remarks of Representative Goodell—who was not, as the court below supposed, the bill's sponsor—were a broad generalized analysis of the bill. His statement that "difference in shift * * * would logically fall within the working condition factor" (109 Cong. Rec. 9209) should not be given controlling weight in light of the generalized nature of his remarks, the genesis of the equal pay definition outlined above, and the manifest purposes of the Equal Pay Act.

CONCLUSION

The question presented in this petition should be resolved by the Court, particularly in light of the conflict between the Second and Third Circuits. However, we believe the same issue is adequately presented by Question No. 1 of the present respondent's Petition for a Writ of Certiorari in the Second Circuit case, No. 73-29, which is now ready for consideration by this Court. We respectfully suggest, therefore, that this Court grant certiorari in No. 73-29, limited to Question No. 1, and postpone disposition of the present petition pending its decision in No. 73-29.

Respectfully submitted.

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OCTOBER 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1590

PETER BRENNAN, Secretary of Labor,
United States Department of Labor, APPELLANT

v.

CORNING GLASS WORKS, a corporation, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 69-396)

Argued Monday, May 21, 1973
Before KALODNER, ALDISERT and ADAMS,
Circuit Judges

OPINION OF THE COURT

(Filed June 28, 1973)

ADAMS, *Circuit Judge.*

This action was commenced by the Secretary of Labor to enjoin claimed violations of the equal pay

provisions of the Fair Labor Standards Act [1] and to restrain the withholding of wages allegedly due certain female employees. The broad issue presented for the Court's judgment is whether Corning Glass Works engaged in wage discrimination violative of the Equal Pay Act [2] by paying more to *night* inspectors than to *day* inspectors at its Wellsboro, Pennsylvania plant.

The basic factual pattern involved in this case implicates the Equal Pay Act because, for reasons

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[1] 29 U.S.C. § 201 *et seq.*

[2] The equal pay provisions were added to the Fair Labor Standards Act as an amendment to § 6(d) of the Act. Enacted by Congress in 1963 to correct certain conditions considered contrary to the country's interest, the Equal Pay Act provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1).

that will be fully explained, *infra*, before October 16, 1966, night inspection work was performed exclusively by males and day inspection work largely by females. Thus, the Secretary asserts, in essence, that Corning paid male night inspectors more than female day inspectors for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ."[3] The district court disagreed, and the case is now here on appeal.

I.

The pay practices at the heart of this controversy developed over a period spanning more than forty-five years. Before 1925, Corning operated its Wellsboro Plant only during the day, finding it either unnecessary or undesirable to employ a night shift. All inspection work at that time was performed by women. The introduction of automated production equipment between 1925 and 1930, however, made it necessary or desirable for the first time to use night shifts.

Until 1947, Pennsylvania law absolutely prohibited the employment of women between the hours of midnight and 6:00 A.M.,[4] and thus, in order to fill inspector positions on the new steady night shift, Corning had to hire men. These night inspectors, selected from male employees within the plant, were paid for their night inspection work the individual

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[3] 29 U.S.C. § 206(d)(1).

[4] Act of July 25, 1913, P.L. 1024.

rates they had previously been receiving. Such wages were higher than the rates paid to women engaged as inspectors on the day shift. A situation thus developed in which male inspectors worked at night, female inspectors during the day, and the male employees were paid at higher rates.[5]

This wage differential was reinforced when, in 1944, the American Flint Glass Workers' Union organized the production and maintenance employees of Corning's Wellsboro Plant and negotiated a collective bargaining agreement providing, for the first time, a plant-wide night shift differential. Despite this new *shift* differential, serving as a premium for night work, the pre-existing *wage* difference between night shift inspectors and day shift inspectors continued in effect.[6]

In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor.[7] Under the applicable regulations, however, Corning could have employed women at night only if it would provide them transportation or if Wellsboro had public

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[5] After installation of the Stevenson, Jordon & Harrison wage evaluation plan in 1947, for example, the resulting wage differentials between the night and day shifts amounted to a high of 19 cents an hour, in addition to the shift differential of 4 cents an hour for the afternoon shift and 10 cents an hour for the night shift. By 1966, the highest base wage differential was 22½ cents an hour.

[6] See note 5, *supra*.

[7] Act of May 21, 1947, P.L. 389, § 4.

transportation. It was not economically feasible for Corning to furnish transportation to its female employees, and public transportation was unavailable. The 1947 state regulations were later amended in July, 1965 to permit night work for those women who had regular, private transportation.[8]

Since October 16, 1966, by mutual agreement between the union and Corning, women have been permitted to exercise their seniority, on the same basis as men, to claim steady night shift jobs when vacancies occur.[9] A considerable number of female employees have availed themselves of this opportunity to take the higher-paying night shift inspection jobs.[10] In addition, several new female employees, as well as a new male employee, have been hired to work as night inspectors.[11]

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[8] CCH State Wage and Hour Citator ¶ 57,849.

[9] They may also "bump" into such jobs during periods when the work force is being reduced.

[10] The parties stipulated that women filled 276 out of 395 openings on night inspection jobs between October 16, 1966 and June, 1970. Each of the 45 inspector jobs thus became available approximately 8 times during this four year period. No contention has been advanced that in filling these jobs Corning discriminated on the basis of sex.

[11] Several females just hired on March 14, 1967 immediately began inspection work on the steady night shift. In addition, some very junior male employees took steady night work. All qualified employees having greater seniority, whether male or female, could have claimed this work.

Thus, after October 16, 1966, female and male employees worked as inspectors on both the day and night shifts.

Male and female inspectors working the same shift have been and are paid at the same base hourly rate. Moreover, under the Corning Glass Works Plan of job evaluation installed on January 20, 1969, all employees hired *after* that date are paid the base wage rate for their job regardless of their sex or whether they work on the day or night shifts. The Corning Plan also provides for a "red circle" rate paid to persons employed *before* January 20, 1969, when working as night inspectors. Thus, all inspectors, male or female, who were employed before the date of the Corning Plan and who work on the steady night shift receive a higher base wage rate ("red circle") than their counterparts, male or female, of comparable seniority, working on the day shifts.

II.

After finding the relevant facts, which were largely undisputed, and in any event mostly stipulated by the parties,[12] the district court held that the Secretary of Labor had not established that Corning violated the Equal Pay Act because he had "failed to sustain its burden of proof that the male inspectors on the night shift and the female inspectors on the day

[12] The parties entered into more than 100 stipulations.

shift performed their work "under similar working conditions," within the meaning of that phrase under the Equal Pay Act. The district court reasoned that "time of day worked is a working condition," and that "night work has a significant sociological, psychological and physiological impact on most workers."

Urging reversal of the district court's judgment, the Secretary contends primarily that: (1) in view of the legislative history of the Equal Pay Act and controlling judicial precedents, shift differences are not properly classified as "working conditions" under the statute's equal work standards; and (2) the work performed by men and women is "substantially" equal.

Needless to say, Corning disagrees with the Secretary's arguments as to "working conditions" in every respect. Moreover, the company seeks affirmance of the judgment of the district court on a number of additional, alternative grounds: (a) if shift differentials are not "working conditions," within the meaning of the Act, they represent a "factor other than sex" upon which wage differentials may legally be based; (b) even assuming a prior violation of the equal pay provisions, Corning achieved compliance with the Act by opening all inspection jobs to both sexes in October, 1966; and (c) its allegedly unlawful conduct occurred prior to the period of the statute of limitations and cannot make illegal action within the period of the statute that is otherwise legal.

III.

Initially, the Court must determine whether the day and night inspection jobs constitute "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Upon this issue the Secretary carries the burden of proof,[13] and in determining whether the district court erred in concluding that such burden was not met, we must keep in mind that the Equal Pay Act does not contemplate that the Secretary of Labor and the courts will engage in job evaluation for the purpose of deciding what is a proper wage differential for unequal work.[14]

Once the Secretary has met his burden of showing equal skill, effort, responsibility, and similar working conditions, the employer, in order to prevail on the merits, must demonstrate that the wage differential is made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of produc-

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[13] *E.g.*, Hodgson v. Corning Glass Works, 474 F.2d 226, 231 (2d Cir. 1973); Schultz v. American Can Co., 424 F.2d 356, 360 (8th Cir. 1970).

[14] *See* 109 Cong. Rec. 9197-98, 9209 (1965). Indeed, in view of the exceptions to the Act, it is clear that "Congress thus intended to allow [certain] wage differentials even though the contrasted employers (sic) were performing equal work." Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 594 (3d Cir. 1973).

tion; or (iv) a differential based on any other factor other than sex. . . ." [15]

The basic issue over which the parties have waged their legal battle is whether time of day worked may properly be classified as a "working condition" within the meaning of the Act. Here, the district court held that steady night work is not performed under "working conditions" similar to day work. However, the Second Circuit recently concluded in Hodgson v. Corning Glass Works,[16] a case remarkably similar to the present one, that, in view of the legislative history of the Act, time of day worked may be used by an employer to justify claimed wage discrimination only as "a differential based on any other factor other than sex," but does not constitute a "working condition" so as to make the Act altogether inapplicable.

Writing for the court in *Hodgson*, Chief Judge Friendly, in concluding that a night shift is not a "working condition," relied in no small part [17] upon the following statement from the Commitee Report:

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the

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[15] 29 U.S.C. § 201(d)(1).

[16] 474 F.2d 226 (2d Cir. 1973).

[17] *Id.* at 232.

> broad general exclusion has been also included. Thus, among other things, shift differentials [restrictions on or differences] based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded. . . ." [18]

In quoting this statement, the Second Circuit opinion interlineated the words "differentials based on any other factor other than sex" in brackets after the words the "broad general exclusion" in the next to last sentence in the quoted paragraph, thus revealing its belief that a "factor other than sex" is the "broad general exclusion" referred to by the Committee.[19] Although, in view of the context and language of the quoted statement, Chief Judge Friendly's interpretation would appear to be correct, we do not conclude, as the Second Circuit apparently did, that the last sentence in the quoted paragraph, beginning with the word "Thus," should therefore be construed as listing only examples of a "factor other than sex."

The specific examples that the Committee Report, in the last sentence, states would be excluded are "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting

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[18] 109 Cong. Rec. 9210 (1963), U.S. Code Cong. & Admin. News, p. 689.

[19] 474 F.2d at 232: " 'As it is impossible to list each and every exception, the broad general exclusion ["differentials based on any other factor other than sex"] has been also included.' "

or moving heavy objects, differences based on experience, training, or ability. . . ." [20] *As a group*, these examples cannot be interpreted as "factor[s] other than sex" for the simple reason that some of them clearly represent requisites to the applicability of the Act: skill, effort, responsibility, and working conditions. Thus, "lifting or moving heavy objects" is, beyond dispute, an example of "effort," and "experence, training, or ability" are examples of "skill." And "effort" and "skill," along with "working conditions" and "responsibility" are specifically listed requisites that would make the Equal Pay Act altogether inapplicable, and which cannot, therefore, logically be classified as "factor[s] other than sex" [21] to be considered as matters of defense.

Of course, our interpretation of the Committee Report—that the examples set forth are not *all* "factor[s] other than sex"—does not by itself suggest the converse—that they are *all* examples of "skill, effort, and responsibility, and . . . working conditions." Thus, the listing made by the Committee Report may in fact be not simply a set of black-or-white illustrations taken exclusively from the Act's requisites (i.e., effort, skill, responsibility, and working conditions) or solely from one of its defenses (factor[s] other than sex"), but rather a chiaroscuro picture painted with brushes dabbed in both groups. The question, therefore, remains whether time of

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[20] 109 Cong. Rec. 9210 (1963).

[21] 29 U.S.C. § 206(d)(1).

day worked is a "working condition" or a "factor other than sex."

The only clear and unambiguous evidence concerning this point is the following statement made during the course of an explanation of the Act by Congressman Goodell, who sponsored the bill and participated in redrafting it:

> "Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" (Emphasis supplied)[22]

Because of its interpretation of the Committee Report, the Second Circuit discounted this explanation by Congressman Goodell,[23] although it was made by the bill's sponsor immediately before reading the Committee Report into the Congressional Record. In addition, it was proclaimed by Congressman Goodell as an example and guideline as to the intent

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[22] 109 Cong. Rec. 9209 (1963).

[23] 474 F.2d at 232.

of Congress. Whatever may be the merits of minimizing the views of a bill's sponsor when a Committee Report is thought to be clear and contrary to the statements of individual legislators,[24] this Court's interpretation of the Committee Report suggests no basic conflict between the Report and Congressman Goodell's statements. A comparison of the two demonstrates this:

Committee Report:	Congressman Goodell:
"Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded . . ."	"Ninth . . . Finally . . . hours of work, differences in shift all would logically fall within the *working condition* factor." (emphasis supplied)
"Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded."	"Ninth . . . The usual factors of push, pull, lift, and carry come under *effort* . . ." (emphasis supplied)
"Thus, among other things . . . differences based on experience, training or ability would also be excluded."	"Ninth . . . such things as experience, ability, and training may be considered under the broad heading of skill. . . ." (emphasis supplied)

Under these circumstances, where the ambiguous Committee Report and the statements by the sponsor of the legislation may reasonably be read not as conflicting but as complimentary and harmonious, giving emphasis to Congressman Goodell's explana-

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[24] *See* Zuber v. Allen, 396 U.S. 168, 186 (1969); United States v. O'Brien, 391 U.S. 367, 385 (1967), involving situations of *conflict* between Committee reports and statements of legislators. *Cf.* American Airlines, Inc. v. C.A.B., 365 F.2d 939, 949 (D.C. Cir. 1966).

tion would not appear inappropriate. Indeed, a sponsor's views are entitled to great weight in any event.[26] As this Court stated in Gartner v. Soloner:[28]

> "In attempting to extract the legislative purpose primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102."

We conclude, then, that time of day worked is a "working condition" within the meaning of the Equal Pay Act and not merely a "factor other than sex" to be used by an employer as a matter of defense.[27]

Therefore, in the circumstances of this case, the statute is inapplicable. Because of this conclusion, we need not and do not decide Corning's other conten-

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[26] *See, e.g.*, National Woodwork Mfgs. Assn. v. N.L.R.B., 386 U.S. 612 (1967); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394 (1951); Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770, 782 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968). It should be noted that this Court has already given weight to Representative Goodell's views concerning the Equal Pay Act. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 595 (3d Cir. 1973).

[28] 384 F.2d 348, 353 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).

[27] The Wage and Hour Administrator's regulations agree with the Second Circuit's treatment of time of day worked as a "factor other than sex" and not a "working condition," 29 C.F.R. §§ 800.100, 800.145. Although such administrative interpretations are entitled to some deference, we cannot pay such homage to them so as to blind ourselves to the meaning of the legislative history as we read it.

tions urged to support affirmance of the district court's judgment.[28]

IV.

Recognizing that the pursuit of intent and meaning in the words of congressional committees and individual legislators may seem to some like exploring a quagmire or, perhaps, fathoming a mirage, we have been cautious against injecting whatever notions of public policy we might have into the interstices of the Equal Pay Act. Congress was careful not to make the equal pay provisions a "Bali Hai," inviting either the Secretary of Labor or the courts to substitute their judgment for that of employers or to judge the merits of job systems. Rather, our task is merely to determine whether an employer has discriminated on the basis of sex by paying different wages "for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . ."

In terms of congressional intent, we cannot say that the district court erred in concluding that "a given job performed [by some at night and others during the day] is not performed under similar work-

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[28] For example, we need not address attention to Corning's assertion that the actual work performed by night inspectors and day inspectors is essentially unequal in terms of skill, effort, and responsibility, *see* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), since, as we hold, the night inspectors and the day inspectors were not working "under similar working conditions."

ing conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not 'very much alike' or 'alike in substance or essentials.' "

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1590

PETER BRENNAN, Secretary of Labor,
United States Department of Labor, APPELLANT

vs.

CORNING GLASS WORKS, A Corporation

(D. C. Civil No. 69-396)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: KALODNER, ALDISERT and ADAMS,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 31, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ Thomas S. Quinn
Clerk

June 28, 1973

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 69-396

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, PLAINTIFF

vs.

CORNING GLASS WORKS, a Corporation, DEFENDANT

OPINION

MUIR, District Judge.

I. INTRODUCTION.

This suit was commenced by the Secretary of Labor on October 2, 1969, pursuant to 29 U.S.C. Section 201, *et seq.*, the Fair Labor Standards Act ("Equal Pay Act"). Plaintiff seeks to enjoin Defendant's alleged practice of wage discrimination based on sex and to obtain restitution of unpaid wages allegedly due certain female employees of Defendant.

II. FINDINGS OF FACT.

1. Corning Glass Works ("Corning") is a New York Corporation having its principal offices in Corning, New York. (Stip. of Fact 2)

2. The Wellsboro plant of Corning Glass Works is the only plant involved in this case. (Stip. of Fact 2)

3. There are four separate jobs involved in this litigation: Inspector-Packer, Frost Light Inspector, Positioner-Inspector, and Quality Inspector. (Stip. of Fact 6)

4. Prior to October 16, 1966, except during World War II, only female employees worked in these inspector positions on the day shifts at the Wellsboro plant. (Stip. of Fact 8)

5. Prior to October 16, 1966, except during World War II, only male employees worked in these inspector positions on the steady night shift in the Wellsboro plant. (Stip. of Fact 9)

6. In 1947, the differential in base hourly rates between the jobs of Inspector-Packer and Inspector-Packer Nights was 19 cents an hour, the differential in base hourly rates between the jobs of Frost Light Inspector and Frost Light Inspector Nights was 18 cents an hour, and the differential in base hourly rates between the jobs of Positioner-Inspector and Positioner-Inspector Nights was 19 cents an hour. (Stip. of Facts 36, 42, 45e)

7. On October 16, 1966, these respective differentials were 20 cents an hour, 16 cents an hour, and 20 cents an hour. (Stip. of Facts 37, 43, 45f)

8. The differential in base hourly rates between the jobs of Quality Inspector and Quality Inspector Nights has increased from 20 cents an hour in 1949 to 22.5 cents an hour on October 16, 1966. (Stip. of Facts 48, 49)

9. These differentials in base rate of pay were in addition to the plant-wide shift differential which has

increased from 6 cents an hour in 1947 to 12 cents an hour in 1966 for steady night work. (Stip. of Facts 21-25)

10. Since October 16, 1966, by mutual agreement between the employees' certified bargaining agent and the Company, women have been permitted to exercise their seniority, on the same basis as male employees, to claim jobs on the steady night shift when vacancies occur and to bump into such jobs during periods when the work force is being reduced. (Stip. of Facts 19, 30, 38, 44, 45a, 79, 85-88, 118, 119)

11. Male and female inspectors who work on the steady night shift inspection jobs involved in this case have been and are paid at the same base hourly rate. (Stip. of Facts 37, 72, 74, 89, 104)

12. Male and female inspectors who work on the day shifts on the inspection jobs involved in this case have been and are paid at the same base hourly rate. (Stip. of Facts 73, 90)

13. A night shift worker is out of phase with community life and is usually out of phase with family life. (3 N.T. 199-200)

14. Night work, both steady and rotating, interferes with the worker's physiological (circadian) rhythms. (3 N.T. 200)

15. The first job evaluation plan at Corning's Wellsboro plant was effective from October 20, 1947, to January 18, 1965, and was called the Stevenson, Jordan and Harrison Plan. It is referred to as the SJ&H Plan. (Stip. of Fact to which Defendant Either

Makes Objection or Withdraws a Prior Objection, P-39 at page 19)

16. The SJ&H Plan measured jobs by weighing the following factors: schooling, training, skill, versatility, knowledge, responsibility, surroundings, and hazards. (Stip. of Fact to Which Defendant Either Makes Objection or Withdraws a Prior Objection, P-50 at page 14)

17. Under the SJ&H Plan, the ratings of these factors differed for each inspector job but the ratings of the surroundings and hazards factors were the same for the day and night shifts for each job. (Stip. of Fact to Which Defendant Either Makes Objection or Withdraws a Prior Objection, P-50 at page 14)

III. Discussion.

Until October 16, 1966, except during World War II, only women worked as Frost Light Inspectors, Positioner-Inspectors, Inspector-Packers and Quality Inspectors on the day shift at the Wellsboro, Pennsylvania plant of Defendant Corning Glass Works, and only men were permitted to work on the night shift.[1] Plaintiff contends that because the male inspectors

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[1] Both parties agree that Plaintiff is barred from recovery for any possible violations prior to October, 1966, by the applicable statute of limitations. However, Plaintiff's claim that Defendant has violated 29 U.S.C. Section 206(d)(1) since that time is based on residual effects of the alleged prior discrimination. Accordingly, Plaintiff's case must fail if discrimination prior to October, 1966 is not proven.

on the night shift received a higher hourly base rate of pay than the female inspectors on the day shift, in addition to a plant-wide shift differential, Defendant violated 29 U.S.C. Section 206(d)(1) which provides:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

In my view, Plaintiff has failed to sustain its burden of proof that the male and female inspectors performed their work "under similar working conditions." Male inspectors worked on the night shift; female inspectors on the day. Plaintiff contends that the time of day worked is not a "working condition"

within the meaning of the statute. Plaintiff relies in part on testimony by Defendant's expert in the field of job evaluation that time of day worked is considered a wage condition, not a working condition. (3 N.T. 207, 211-212) Plaintiff also relies on the fact that the criteria evaluated under the job evaluation plans used by Defendant did not include time of day worked, and on selected legislative history. Defendant, on the other hand, points to Murphy v. Miller Brewing Company, 307 F.Supp. 829, 835 (E.D. Wisc. 1969) where the Court stated that

> "(i)t is not subject to serious dispute that there is some difference in *working conditions* between the first, second, and third shifts merely because the work is performed at different times of the day." (Emphasis supplied).

In addition, Defendant too relies on legislative history to support its position. In my view, time of day worked is a working condition within the meaning of 29 U.S.C. Section 206(d)(1).[2] As Defendant's expert testified, night work has a significant sociological, psychologoical and physiological impact on most workers.[3] It is a condition of employment which can affect an employee's work more than disagreeable surroundings or exposure to hazard. It is a

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[2] Cf. 29 C.F.R. Sec. 800.131-132; see also Independent Oil Workers Union, Local 117, v. American Oil Co., 296 F. Supp. 650, 658 (D. Kan. 1969).

[3] See Findings of Fact 13 and 14.

condition under which most people would prefer not to work.

The question remains whether despite the difference in time of day worked, the day and night inspectors worked under working conditions which as a whole were similar. It appears that except for the time of day worked, their working conditions were the same.[4] In my view, a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not "very much alike" or "alike in substance or essentials."[5] Hence, Plaintiff has failed to prove a violation of 29 U.S.C. Section 206(d)(1).

IV. Conclusions of Law.

1. This Court has jurisdiction of the parties and subject matter of this action.

2. Plaintiff has the burden of proving for each of the four inspector jobs involved in this case that male and female inspectors labored under similar working conditions but were not paid equal wages for equal work.

3. Work performed on the night shift is not performed under working conditions similar to work performed on the day shifts.

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[4] See Findings of Fact 15-17.

[5] Webster's Third New International Dictionary, Unabridged, 1966.

4. Since female inspectors worked on the day shifts and male inspectors worked on the night shift, Plaintiff has not sustained its burden of proof that male and female inspectors labored under similar working conditions.

5. Plaintiff has not proven any violation of 29 U.S.C. Section 206(d)(1).

An order in accordance with this Opinion will be entered.*

/s/ Muir
United States District Judge

DATED: March 30, 1972

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* In the event that the Court of Appeals for the Third Circuit should decide that my reasoning is erroneous, I have filed "Supplemental Findings of Fact." These are not necessary to my decision, but might be helpful to that court in reaching an opposite conclusion or might eliminate re-litigation of these issues if the case has to be re-tried.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Civil Action No. 69-396

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor, PLAINTIFF

vs.

CORNING GLASS WORKS, a Corporation, DEFENDANT

ORDER

Judgment is hereby entered in favor of Defendant and against Plaintiff. Plaintiff's request for an injunction enjoining alleged violations of Sections 15 (a) (1) and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 29 U.S.C. Sections 201-219, and for withholding of payment of wages allegedly due Defendant's employees under the Act, is hereby denied.

/s/ Muir
United States District Judge

DATED: March 30, 1972

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Civil Action No. 69-396

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor, PLAINTIFF

vs.

CORNING GLASS WORKS, a Corporation, DEFENDANT

SUPPLEMENTAL FINDINGS OF FACT

A. Historical Background

1. Plaintiff claims a violation of the Equal Pay Act only with respect to employees who were hired prior to January 20, 1969. No violation is claimed at this time with respect to employees hired subsequent to January 20, 1969. (Stip. of Fact 121)

2. The steady night inspection jobs were created between 1925 and 1930 because of the introduction of automatic production equipment which made it necessary to inspect ware on all shifts. (Stip. of Fact 10)

3. At the time of the institution of inspection work on the night shift, and until 1947, Pennsylvania law absolutely prohibited the employment of women between the hours of 12:00 p.m. and 6:00 a.m. (Stip. of Fact 15). Thus, men had to be hired for this first night inspection shift.

4. These men were selected from male employees within the plant. (Stip. of Fact 13)

5. These men were paid the individual, personal rates they were already receiving which were higher than the rates being paid to women doing inspection work on the day shift. (Stip. of Fact 13)

6. At the time of the institution of inspection work on the night shift, Corning did not pay shift differentials. (Stip. of Fact 11)

7. During at least part of World War II, women were employed on the steady night shift as inspector-packers. (1 N.T. 203; 3 N.T. 132). There is no evidence that these women did or did not receive the same wages as the male inspector-packers working at night.

8. In 1947, Pennsylvania law was amended to permit women to work at night conditioned upon the approval of the State Department of Labor (Act of May 21, 1947, P.L. 389, Sec. 4). The State regulations provided, among other things, that in order to be permitted to employ women at night an employer was required to furnish transportation where public transportation was not available. (Stip. of Fact 16)

9. Public transportation has not been available in Wellsboro, Pennsylvania. (Stip. of Fact 18).

10. It has not been economically feasible for Corning to furnish transportation to its female employees. (3 N.T. 195-196)

11. In 1944 the American Flint Glass Workers' Union of North America negotiated a collective bargaining agreement covering many production and maintenance employees of Corning Glass Works,

Wellsboro plant, including the inspectors who worked on the inspection jobs involved in this case. (Stip. of Fact 21)

12. This contract provided that, for the first time, all employees working a non-rotating night shift would receive a shift differential as a premium for such night work. (Stip. of Facts 22 and 23)

13. In addition to this new "shift differential" applicable to all night workers, this contract continued in effect the existing differential in base rate of pay between the employees on the steady night shift *inspection* jobs and employees on the day and afternoon shift *inspection* jobs. (Stip. of Fact 23)

14. All collective bargaining agreements entered into by Corning with the Union, between the years 1944 and 1969 continued to maintain the differential in base rate between the steady night shift inspection jobs and the day and afternoon shift inspection jobs, except for minor variations caused by the negotiation of percentage rather than flat rate increases. (Stip. of Fact 24)

15. The following jobs were performed exclusively by men on all shifts at least until October 17, 1966:

Job Code	Job Title	Group No.
1836	Industrial Truck & Equipment Opr.	7
2015	Head Mixer	10
4007	Glass Melting Furnace Operator	11
4031	Optical Reader Forehearth & Lehr Opr.	14
2181	Cng. Rbn. Mch. Operator—Class B	14
2184	Relief Attendant	10
2280	Cng. Rbn. Mch. Operator—Class A	18
1053	Hiker	3
3838	Traying Machine Operator	5
4457	Frost Operator	8
4466	Misc. Frost Operator	9
3608	Opr. Cut & Finishing Machine	9
3716	Ceramic & S & L Operator	9
5711	Sahara Operator	9
5739	Finishing Equipment Mechanic	11
0850	Ind. Truck Driver & checker	8
5728	Shift Maintenance Mechanic	13
6213	Electrician—Class A	16
6214	Electrician—Class B	12
5224	Packing Equipment Operator	7
5287	Attendant Hamper Maker & Sealer	4

(Plaintiff's Exhibit 1, p. 13)

16. With respect to these jobs, the base hourly rate has been the same on all shifts. (Plaintiff's Exhibit 1, p. 13)

17. On July 17, 1965, the State regulations were amended to provide that an employer in a manufacturing establishment could employ women between the hours of 10:00 p.m. and 6:00 a.m. if that employer arranged for adequate transportation for women workers or if prompt public transportation was available or the individual worker had regular private transportation. CCH State Wage and Hour Citator Paragraph 57,849. (Stip. of Fact 17)

18. Beginning on October 16, 1966, Corning has employed women between the hours of 12 midnight and 6:00 a.m. without providing transportation. To the best of Defendant's knowledge, these employees have regular private transportation. (Stip. of Fact 19)

19. The job of Positioner-Inspector on the night shift was eliminated on September 11, 1966, and since that time it has been performed only on the day shift. (Stip. of Fact 53; cf. Stip. of Fact 45f)

B. Differences Between the Night and Day Inspector Shifts

20. The primary duties of men and women working as Inspector-Packers, Positioner-Inspectors, Frost Light Inspectors and Quality Inspectors do not depend on which shift is being worked. (Stip. of Facts 33, 41, 45d, 46; I N.T. 7-8, 128, 143-150, 156-158, 164-193; 2 N.T. 44-65, 86-90, 93-94, 95-98, 103-108, 112-120; 3 N.T. 105-106, 134-136, 139-140, 147-154, 155-185, 189-192, 194)

21. Male inspectors on the steady night shift have performed additional duties requiring substantially greater physical effort, including heavy lifting and pushing, than jobs having the same titles on the day shifts. Only men have performed such duties, and most women could not perform many of these duties. (Stip. of Facts 34, 35, 64; 1 N.T. 170-184, 193, 198; 2 N.T. 104-109, 112-116, 197-213, 215-235; 3 N.T. 104-105, 108, 135-140, 149, 155-164, 168-172; Defendant's Exhibits D1-D85)

22. These duties are not included in the duties of these jobs on the day shifts. (2 N.T. 106-107, 215-216, 226-227).

23. On the day shifts, these duties are usually performed by "Hikers," traditionally males (Stip. of Fact 66)

24. On October 16, 1966, the maximum base rate of pay for Hikers was higher than that for night shift inspectors but lower than that for day inspectors (excluding shift differentials). (Stip. of Facts 75, 45f, 43, and 37)

25. On the day shifts, male inspectors who are called upon to perform the job of Hiker carry a multiple rate and receive the rate for the job of Hiker when performing the job of Hiker. This is also true of any male inspectors on the night shift with seniority after January 20, 1969, but not of male inspectors on the night shift hired prior to January 20, 1969, who continue to receive their inspection rate even when performing Hiker duties. (Stip. of Fact P-112 at page 24)

26. The heavy aspects of the Hiker job are lightened to the extent necessary by assigning as many men as are needed to accomplish it (2 N.T. 198-203; 3 N.T. 44, 183); by using mechanical aids (2 N.T. 198-202, 226; 3 N.T. 42, 183-184); and by rotating the men between the tiring duties and the lighter duties. (2 N.T. 223)

27. There are approximately the same number of hikers on all shifts. Three to 13 men work as Hikers

assisting inspectors on the morning and afternoon shifts. Three to 13 men work as Hikers assisting inspectors on the night shift. (Stip. of Fact 67; 3 N.T. 35)

28. The amount of time male inspectors on the steady night shift spend performing heavy manual labor varies from day to day and from person to person. (Defendant's Exhibits D1-D85)

29. Male inspectors on the night shift have spent about 25 to 30% of their time doing manual labor, heavy and light. (3 N.T. 104-108, 111, 138-139)

30. Some of the time which these male inspectors on the night shift spent performing manual labor was due to an excess of inspectors on that shift. (1 N.T. 189)

31. Although there is a wide variance from day to day and from person to person in the amount of time male inspectors on the night shift spend performing manual labor, they are all always paid at the same base hourly rate (aside from considerations of seniority) without regard to the nature and frequency of their performance of manual labor. (Stip. of Facts 37, 43, 45f)

32. A male inspector on the night shift who at times has been physically unable, due to illness, to perform the heavier aspects of Hiker work has not had his pay reduced. (2 N.T. 93-94)

33. Since October 16, 1966, when women first were permitted to apply for night shift inspector jobs, they have not had to perform manual labor at night. (2 N.T. 235)

34. During interruptions, at times, some inspectors on all shifts are assigned to the reinspection belt. The reassigned female inspectors and some of the reassigned male inspectors on all shifts engage in inspecting and repacking the ware at the belt. The inspection at this belt is primarily for broken bulbs. This is work within the Inspector-Packer job classification. (Stip. of Fact 63)

35. In addition, the female employees who have performed the inspector jobs involved in this case since October 2, 1966, generally have been and are available for and at times have been assigned to other jobs involving a great variety of duties, some of which require greater effort, skill, and responsibility and are performed under different working conditions than their inspector jobs.

36. Women inspectors are occasionally required to lift boxes weighing 30 pounds or more. (3 N.T. 161)

37. The only differences between the jobs of Quality Inspector and Quality Inspector Nights is that the latter generally (1) make the final decision to withhold glass or let it pass without consulting with a foreman; and (2) set their own machines in case of change-over. (1 N.T. 7-8, 3 N.T. 189-194)

C. Job Evaluation Plans

38. Under the Corning Glass Works (CGW) Plan of job evaluation, which was installed on January 20, 1969, all employees hired after January 20, 1969,

are paid the evaluated base wage rate for that job without regard to whether they work at night or during the day or whether they are men or women. (Stip. of Fact 101)

39. From October 20, 1947, to January 17, 1965, Defendant maintained separate rate schedules for males and for females. (Stip. of Fact P-60 at page 21)

40. Until October 16, 1966, Defendant maintained separate seniority lists for males and females. (Stip. of Fact 77)

41. Under the separate rate schedules for men and women, male inspectors working the steady night shift were paid a higher base hourly rate than the day and afternoon female inspectors who performed work rated at the same points by Defendant's SJ&H Plan. (T-20, 21, 60 and 61 to Plaintiff's Exhibit G)

42. The SJ&H plan provided for calculating the basic wage rates for men by converting the total values of the jobs evaluated under the plan to a rating factor and multiplying the rating factor by the unskilled labor rate of the vicinity for men. The same procedure was followed for calculating the basic wage rates for women except the unskilled labor rate of the vicinity for women was used to obtain the female rate. (Page 13 of Exhibit J to Plaintiff's exhibit 1)

43. Effective, January 18, 1965, Defendant merged the separate male and female schedules into

one revised rate schedule (Stip. of Fact P-69 at page 22)

44. This merger, however, preserved the differentials in maximum base rate between the male and female inspectors. Some of the subordinate rates were changed very slightly. (Stip. of Facts 37, 43, 45f and 49; pages 192-194 of Plaintiff's Exhibit 6)

45. Under the CGW plan, the wage rate is the same on all three shifts and for both sexes for all inspectors hired after January 20, 1969. (Stip. of Fact 102)

D. Effect of the Changes since October 16, 1966, on Wages Paid to Inspectors

46. Women must wait for vacancies in night shift jobs to occur unless they bump into such jobs in the event of a reduction in force. (Stip. of Fact 44)

47. In the event of a force reduction in a particular job, employees on the job for less than 84 days are dismissed first from that job, in order of plant-wide seniority. (Stip. of Fact P-83 at page 22)

48. Beginning October 16, 1966, a number of female employees have availed themselves of the opportunity to take the higher-paying night shift inspection jobs. (Stip. of Facts 80 and 88)

49. Several females who were first hired on March 14, 1967, immediately began work as Inspector-Packers on the steady night shift that same night. (4 N.T. 10-11)

50. A male who was hired on September 20, 1966, began work as a Frost Light Inspector on the steady night shift on June 10, 1967. (4 N.T. 12)

51. Another male, hired on May 9, 1966, began work as a Quality Inspector on the steady night shift on March 31, 1967. (4 N.T. 12)

52. All qualified employees of the Wellsboro plant who had greater seniority than the employees listed in the previous three paragraphs could have claimed the steady night shift inspection jobs on the dates those employees began work on those jobs. (4 N.T. 13-16)

53. Since 1944 every collective bargaining agreement has contained Article 15, section 2, which provides:

> "When job evaluation * * * results in wage brackets lower than prevailing rates then paid for the job it is not the intention of the company to reduce the prevailing base rates of employees currently working on such jobs." (Stipulation 108)

54. Paragraph 9 of Schedule A of the installation rules of the CGW Plan provides:

> "Any employee who as of the date of the installation of the CGW Hourly Job Evaluation Plan is an employee of the Wellsboro plant covered by the terms of the Basic Agreement and who thereafter by operation of rights under the Basic Agreement continues to hold or takes any of the jobs specified on the (night) shift shall receive the rate which he or she would have received for that work under pre-existing practices. Those jobs being:

Inspector-Packer(N)
Positioner-Inspector(N)
Frost Light Inspector(N)
Quality Inspector(N)

Persons who become employees after the date of installation shall be paid the evaluated rate when they perform work on any of the evaluated jobs." (Stipulation 109)

55. The rates paid under paragraph 9 of Schedule A are called "red-circle" rates by Corning. (Stipulation 111)

56. Because of these "red-circle" rates, all inspectors (male and female) employed before January 20, 1969 working on the steady night shift receive a higher base wage rate than their counterparts of comparable seniority working on the day shifts. (Stip. of Facts 103, 104)

57. This "red-circle" rate will not be paid to employees hired after January 20, 1969. (Stip. of Fact. 113).

58. Since October 16, 1966, a few male inspectors have taken day and afternoon inspection jobs with concomitant reduced base hourly rate. (Stip. of Facts 117, 73, 37, 43, 45f and 49)

E. Wilfullness

59. At least since May 4, 1964, Defendant has been aware of the Equal Pay Act because on that date, one of Defendant's attorneys advised Wellsboro officials of the Act and its implications, and told them to refer

any possible violations to officials in Corning, New York. (Stip. of Fact P-6 at page 5)

60. On January 24, 1966, Corning was advised by an investigator for the Department of Labor that Defendant was in violation of the Equal Pay Act at its main plant in Corning, New York, in that female inspectors on the day shifts were being paid lower base hourly rates than their male counterparts on the night shift. The investigator stated that the Department's position was that the base hourly rates of the women should be raised to that of the men and restitution paid. (Stip. of Fact P-11 at page 6)

/s/ Muir
United States District Judge

DATED: March 30, 1972

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